

88-5626

NO. \_\_\_\_\_

FILED

JAN 8 1964

ALEXANDER L. STEVENS,  
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IN THE  
UNITED STATES SUPREME COURT  
OCTOBER TERM, 1963

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RONALD CLARK O'DRYAN,

Petitioner

v.

DAN V. MCKASALE, ACTING DIRECTOR,  
TEXAS DEPARTMENT OF CORRECTIONS,

Respondent

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On Petition For Writ Of Certiorari  
To The United States Court of Appeals  
For The Fifth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

- I. WHETHER THE EXCLUSION OF THREE PROSPECTIVE JURORS VIOLATED THE DOCTRINE OF WITHERSPOON V. ILLINOIS, 391 U.S. 512 (1968).
- II. WHETHER THIS COURT SHOULD CONSIDER A CLAIM NOT RAISED IN THE COURT BELOW.

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RONALD CLARK O'BRYAN,

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DAN V. MCKASKLE, ACTING DIRECTOR,  
TEXAS DEPARTMENT OF CORRECTIONS,

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RESPONDENT'S BRIEF IN OPPOSITION

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES Dan V. McKaskle, Acting Director, Texas Department of Corrections, Respondent herein, by and through his attorney, the Attorney General of Texas, and files this Brief in Opposition:

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at O'Bryan v. Estelle, 714 F.2d 365 (5th Cir. 1983), and is attached to the petition for certiorari as Appendix A.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court under the provisions of 28 U.S.C. Section 1257(3).

## CONSTITUTIONAL PROVISIONS AND STATUTES

Petitioner bases his claims upon the Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

### STATEMENT OF THE CASE

Petitioner was convicted of the October 31, 1974, murder of his eight-year-old son, Timothy, for remuneration, which was to be proceeds from a number of life insurance policies on his son's life. Petitioner's conviction and death sentence were imposed in June, 1975. The factual and procedural history of this case is fully and accurately set out in the opinion of the court below at 714 P.2d 369-70.

### SUMMARY OF THE ARGUMENT

There are no special or important reasons for review of this case. Petitioner's contention that three veniremen were excluded in violation of Witherspoon v. Illinois, 391 U.S. 510 (1968) is meritless. A review of the entire voir dire examination of each venireman reveals that each made unmistakably clear that he would automatically vote against the imposition of the death penalty, no matter what the trial revealed. Thus, the exclusions for cause were constitutionally permissible under Witherspoon.

This Court should refuse to consider a claim not raised in the court below. Petitioner never previously argued that the state courts failed to conduct a proportionality review of the imposition of the death penalty in his case. This Court has consistently declined to review issues not raised or decided in the courts below and thus the Court should decline to review this contention.

### REASONS FOR DENYING THE WRIT

1. THE QUESTIONS PRESENTED FOR REVIEW ARE UNWORTHY OF THIS COURT'S ATTENTION.

Rule 17 of the Rules of the Supreme Court provides that review on writ of certiorari is not a matter of right but of judicial discretion, and will be granted only when there are special and important reasons therefor. Petitioner has advanced no special or important reason in this case and none exists.

II. THERE IS NO WITHERSPOON V. ILLINOIS ERROR.

Contrary to Petitioner's assertions, no jurors were excluded in violation of Witherspoon v. Illinois, 391 U.S. 510 (1968) or Adams v. Texas, 448 U.S. 38 (1980).<sup>1</sup>

In Witherspoon v. Illinois, *supra*, this Court held, *inter alia*, that in a capital trial, no venireman could be excluded for cause for his views regarding the imposition of the death penalty unless he made unmistakably clear that he would "automatically vote against the imposition of capital punishment without regard to any evidence that might be developed" at trial. 391 U.S. at 522-23 n.21. See also Boulden v. Holman, 394 U.S. 478 (1969); Davis v. Georgia, 429 U.S. 122 (1976); Adams v. Texas, 448 U.S. 38 (1980). Because the record in the instant case reflects that each venireman unequivocally maintained that he would automatically vote against the imposition of the death penalty, or would only consider it where a member of his family had been murdered, no matter what the trial revealed, the exclusion of each for cause was constitutionally permissible.

Venireman Charles D. Wells first stated several times that he did not think he was capable of personally voting for the imposition of the death penalty, although he could imagine others doing so (SF 16, 19-20).<sup>2</sup> When asked by the court whether he would automatically vote against the imposition of death no matter what the trial revealed, he twice maintained that he would do so (SF 21). Upon examination by defense counsel, Wells again maintained that there were no circumstances in which he possibly could vote for the death penalty (SF 23). Although he once stated that he would answer the special issues "truthfully," (SF 25) he never wavered in his clear and unambiguous refusal to vote for the death penalty under any circumstances. His statement that he would answer the issues truthfully was insufficient to rehabilitate his prior unwavering resolve to refuse to consider

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<sup>1</sup> The record clearly reflects that the Witherspoon doctrine, and not V.T.C.A. Penal Code Section 12.31(h), was the sole basis of inquiry into the veniremen's attitudes towards the imposition of capital punishment; thus, this Court's decision in Adams has little application to the instant case.

<sup>2</sup> The record reference is to the number appearing on the upper right-hand page of the transcription of the statement of facts.

the death penalty no matter what the trial revealed, especially in light of defense counsel's failure to intimate to the venireman that affirmative answers would result in the mandatory imposition of the death penalty. When asked about his beliefs regarding the death penalty, Wells responded:

A . . . I don't think that I am capable of issuing a penalty of death to any man.

(SF 19).

. . .

A I can imagine [a jury assessing the death penalty], but I can't see myself doing it.

. . .

Q But you can't imagine yourself doing it as one of those jurors, is that correct, sir?

A I can hardly see myself doing it, yes.

. . .

Q . . . you cannot imagine a case where you would vote for the imposition of death in the electric chair. Is that correct, sir?

A No, I can't.

(SF 20).

. . .

Q [THE COURT] . . . would you automatically vote against the imposition of the death penalty no matter what the trial revealed?

A Yes, I would.

Q All right.

A I would vote against it.

(SF 21).

Q [DEFENSE COUNSEL] Didn't I hear you answer yes, there is a case where you could think of the death penalty?

A No, I said I could imagine it, but I couldn't see myself doing it, giving it.

(SF 22-23).

Q . . . Now, are you saying at this time that under no circumstances, regardless of what the testimony would be, under no circumstances could you vote for the death penalty?

A I don't think there are any that I possibly could vote for the death penalty.

(SF 11). The record then reflects that, in response to further questions by defense counsel, Wells testified that he would answer the special issues "truthfully." Nowhere, however, did defense counsel explain that if he answered both issues "yes," the court would be required to impose the death penalty. Thus, Petitioner's assertions that the venireman's responses were "equivocal" cannot be sustained, as nowhere did Wells retract or equivocate in his previous clear, unambiguous and affirmative resolve to vote against the imposition of the death penalty, no matter what the trial revealed.

Venireman Gus B. Bowman affirmed that he would automatically exclude consideration of the death penalty in every case, except where the victim was a member of his own family. After expressing reservations about the imposition of capital punishment, Bowman stated:

A . . . Now, I doubt very seriously if I could assess the death penalty. I could give him life or some other punishment, but I don't think in my mind that I could condemn him to death.

Q [Prosecutor] . . . And I take it by your answer that in every case, no matter how serious it was, you as a juror could automatically exclude consideration of the death penalty and would in every case turn to some other form of punishment, whether it be life confinement or 99 years or whatever?

A I think that's true.

(SF 170-71). Defense counsel then inquired:

Q . . . my question would be, could you consider the death penalty. Could you consider the death penalty?

A Well, if I could consider it, it seems to me like I would be willing to do it. I don't think that I would be willing to condemn a man to death.

. . .

Q Can you think of any circumstance, where you could possibly consider the death penalty. It doesn't mean you have to give it. Nobody is asking you to vote for it. Could you consider it?

A I could only consider it if it was closer to home to me.

Q Well, no. All I'm asking, sir, is if you could conjure up in your mind, if you could think of some circumstances, could you consider giving the death penalty. I'm not talking about --

A No, sir, I couldn't.

Q Even if it was closer to home?

A If it was closer to home, I could.

. . .

THE COURT: What do you mean by closer to home?

JUROR BOWMAN: If it was one of my family.

THE COURT: Well, if it was one of your family, you couldn't be a juror in that case.

[Defense Counsel] I understand that. Your Honor, but Mr. Bowman has said he could consider it in some case.

THE COURT: Well, you have to understand the circumstances of a case where he could be a juror. He can't be a juror if it's a member of his family.

[Defense Counsel:] I understand that, but I asked the question, could he conjure up in his mind, consider it, just consider it.

THE COURT: That's an improper question because he couldn't consider it, because he couldn't be a member of the jury.

(SF 172-73). Thus, it unequivocally appears that Bowman would in all circumstances in which he were qualified to sit as a juror refuse to consider the imposition of the death penalty. The Court of Criminal Appeals, in overruling Petitioner's Witherspoon claim, held:

From his examination, it is apparent that veniresman Bowman could consider capital punishment only if the victim of the crime were a member of his family. In such a circumstance, veniresman Bowman would be unable to serve as a juror because of his interest and prejudice in the case. Article 25.16, Vernon's Ann.C.C.P. The ability to consider capital punishment as a tool of vengeance by a person aggrieved by the loss of a family member is surely not within the contemplation of Witherspoon. No other group would be more predisposed to vote for capital punishment than a jury composed of surviving members of the deceased victim's family. The situation in which Bowman could consider the imposition of death as a penalty is the situation which Witherspoon proscribes -- the imposition of the death penalty by a "hanging jury."

case where he was otherwise qualified to sit as a juror. In those situations, Lowman was resolved to vote against capital punishment, regardless of the evidence produced. He was properly excused under Witherspoon.

591 S.W.2d at 473 (emphasis added). There was no error in the exclusion of this venireman.

Finally, Petitioner contends that venireman L. P. Pfeffer was excluded in violation of Witherspoon. A review of the entire voir dire examination of Pfeffer reveals that this claim is meritless. The record reflects that at first, Pfeffer experienced great difficulty in articulating his position. Subsequently, however, he became firm in his position that if he had to give an unequivocal answer to the questions of the court and counsel, then he had to state that he would automatically vote against the imposition of the death penalty. Pfeffer was unsure and equivocated several times as to whether he could even consider the imposition of capital punishment (SF 128-37). He then stated that perhaps he could vote for death in a "very, very extreme set of circumstances" (SF 117). Immediately thereafter, however, he equivocated again. At this point, the court stated:

THE COURT: Well, the law requires that we have a definite answer.

JUROR PFEFFER: I understand, right.

THE COURT: Because the law does allow people to be excused because of certain beliefs that could be prejudicial or biased for one side or the other, and both sides just want to know if you can keep an open mind, consider the entire full range of punishment, whatever that may be, and under the proper set of circumstances, if they do exist and you feel they exist, that you could return that verdict. And that's in essence what they're asking.

JUROR PFEFFER: Indirectly, I guess I would have to say no.

THE COURT: You could not?

JUROR PFEFFER: I would have to say no then, to give you a yes or no answer.

THE COURT: Then, am I to believe by virtue of that answer that regardless of what the facts would reveal, regardless of how horrible the circumstances may be, that you would automatically vote against the imposition of the death penalty?

THE COURT: Well, that's the question I have to have a yes or no to.

JUROR PFEFFER: Right.

THE COURT: And you're the only human being alive who knows, Mr. Pfeffer.

JUROR PFEFFER: Right. I understand. If I have to make a choice between yes and no, I would say that I couldn't make the judgment.

THE COURT: You could not?

JUROR PFEFFER: No, I don't think I could. Speaking in general, I mean -- not speaking in general, but specifically, emotionally, I have a mixed feeling, but for the good of every one concerned, I would have to say I think in any case of capital punishment I would have to say no at the present time.

THE COURT: You yourself could not do it?

JUROR PFEFFER: Well, I think this is true, yes, sir.

THE COURT: Whether somebody else say do it, we're not really concerned about, but yourself could not do it?

JUROR PFEFFER: Well, I believe this is true, yes.

THE COURT: You yourself are in such a frame of mind that regardless of how horrible the facts and circumstances are, that you would automatically vote against the imposition of the death penalty? Is that correct?

JUROR PFEFFER: Well, if it says a yes or no, I would have to say yes. I would automatically vote against, to give a correct answer.

THE COURT: You would vote against?

JUROR PFEFFER: Yes.

(SF 137-45). Defense counsel then further inquired into the venireman's responses, and Pfeffer remained firm:

[Defense Counsel]

All right. Now, when Mr. Driscoll was talking with you, you indicated that based upon the facts and based upon the evidence that would be produced here, that you could consider the death penalty. Is that correct, sir?

A I believe I stated that -- to make a direct answer, I would have to say no. I believe this is what I stated.

Q But what you're saying then, is, under no circumstances, under no circumstances -- you see, nobody is asking you to give the death penalty. Nobody is asking you to do that today. You understand that?

A Right, I understand.

Q Then, under no circumstances could you even consider the death penalty. If that what you're saying, sir, under the worst circumstances you can possibly imagine?

A Well, I think I answered that at the present time with a yes or no answer, I said no. I would not consider it, is what I --

Q Under the worst kind of circumstances you couldn't possibly consider the death penalty?

A Well, to get a direct answer at the present time, I said no.

(SF 141-42). Defense counsel, taking a different tack, inquired into the witness's ability to answer the special issues submitted at the punishment phase of a capital trial:

Q If the defendant were found guilty -- and of course, he stands here innocent as he sits here now -- the questions would be asked, one, whether the conduct of the defendant that caused the death of the deceased was committed deliberately and a reasonable expectation that the death of the deceased or another would result.

Now, could you answer that question, sir? Does that question pose any problems to you?

A I think it would, because it would have a direct bearing on the outcome anyway, what we've been talking about with the Judge a minute ago.

Q Well, my question would be, could you or could you not answer that question, sir?

A Well, I would have to say I couldn't. I already made the statement a moment ago.

Q You could not answer that question?

A No, sir. I wouldn't under the statements I made previously. I would say no.

(SF 143-44). Defense counsel was allowed to inquire one final time:

Q Then, under no circumstances, Mr. Pfeffer, could you even think, of voting or answering those questions if the

result of those questions were to be to, in effect, give somebody the death penalty. Is that correct?

A I think at the present time that's correct, yes.

Thus, not only did the venioren maintain that he was unable even to consider the imposition of the death penalty, but he also maintained that he would be unable to answer the special issues, due to his refusal to consider the full range of punishment for the capital offense. Thus, clearly the exclusion of Pfeiffer was consistent with the Witherspoon doctrine.

The record reflects extensive voir dire examination of each of these three venioren excluded for cause. Petitioner was given ample opportunity to inquire into the convictions of each. The record reflects that the court and all counsel understood and applied the doctrine of Witherspoon. Petitioner's assertions to the contrary must be overruled in light of the record. The lower courts were correct in their conclusions that there was no violation of Witherspoon v. Illinois, in the exclusion of these venioren.

III. THIS COURT SHOULD REFUSE TO CONSIDER A CLAIM  
NOT RAISED IN THE COURT BELOW.

Petitioner's contention that the state courts declined to conduct a proportionality review of the propriety of the imposition of the death penalty in his case has not been raised or presented in the courts below. This Court has consistently declined to review in a petition for writ of certiorari issues which were not raised or decided in the courts below. Tacon v. Arizona, 412 U.S. 351 (1973); Cardinale v. Louisiana, 394 U.S. 437 (1969). In view of Petitioner's failure to raise this issue in the courts below, this Court should decline to review this contention.

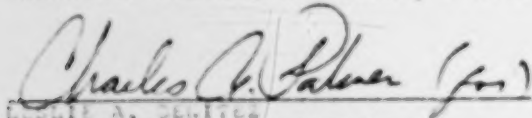
CONCLUSION

For the reasons discussed above, Respondent respectfully requests that the petition for certiorari be denied.

Respectfully submitted,

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